

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

January 5, 1996

ORDER
(SCHOOLS AND LIBRARIES)

PUBLIC UTILITIES COMMISSION
Investigation Into Regulatory
Alternatives for the New England
Telephone and Telegraph Company
d/b/a NYNEX

Docket No. 94-123

FREDERIC A. PEASE ET AL. V.
NEW ENGLAND TELEPHONE AND
TELEGRAPH COMPANY D/B/A NYNEX
Complaint Requesting Commission
Investigation of the Level of Revenues
Being Earned by NYNEX and Determination
of Whether Toll and Local Rates Should
be Reduced

Docket No. 94-254

WELCH, Chairman; NUGENT and HUNT, Commissioners

TABLE OF CONTENTS

I. SUMMARY OF DECISION.....	3
II. BACKGROUND OF PROCEEDING.....	3
A. <u>Commission Order; Procedures</u>	3
B. <u>Description of NYNEX Proposal</u>	4
C. <u>Description of NECTA Proposal</u>	5
D. <u>Summary of Other Comments</u>	5
III. THE APPROVED PLAN.....	6
A. <u>Eligible Public Schools and Libraries</u>	7
1. <u>Public Libraries</u>	7
2. <u>Schools</u>	9
B. <u>Backbone Tier</u>	9
C. <u>Access Tier</u>	10
1. <u>NYNEX 56 Kbps Standard Package</u>	10
2. <u>NYNEX Business Line and Modem Standard Package</u>	10
3. <u>Alternative Equivalent Value Services</u>	11

4.	<u>Computers</u>	12
5.	<u>Additional Discounted Access Lines for Libraries</u>	12
6.	<u>Free Public Access</u>	13
IV.	LEGAL AUTHORITY	13
V.	AVAILABILITY IN AREAS SERVED BY INDEPENDENT TELEPHONE COMPANIES	18
VI.	MEASUREMENT AND TRUE-UP	19
	A. <u>Measurement of Costs</u>	19
	B. <u>Accrual</u>	20
VII.	OVERSIGHT	21
	A. <u>Commission Responsibility</u>	21
	B. <u>Advisory Board</u>	21
	1. <u>Membership</u>	21
	2. <u>Duties, Responsibilities, and Authority</u>	22
	3. <u>Procedure</u>	23
	C. <u>Reporting</u>	24
VIII.	RELATIONSHIP TO OTHER INFORMATION SERVICE INITIATIVES	25

I. SUMMARY OF DECISION

In this Order, we approve a plan to provide access to information networks and services to those public libraries and public schools that presently lack adequate access. Under the approved plan, all services or facilities will be provided by or through NYNEX, and NYNEX will supply the funding for the plan up to \$4.0 million per year for five years. The plan includes a NYNEX-provided Backbone Tier and two standard NYNEX-provided Access Tier packages. Included in these Access Tier packages are computers and connection equipment for libraries and schools that do not presently have that equipment. The plan also allows schools or libraries to opt for alternative equivalent value services that can be used as alternatives to the standard Access Tier packages. The alternatives may include access technologies and network functions furnished by NYNEX or other providers (e.g., cable television or interexchange companies).

We are requiring measurement and true-up of costs to evaluate whether this plan satisfies our intent to provide up to \$4.0 million per year for five years for school and library connections. We will require the use of intrastate marginal costs of NYNEX's incremental expenditures for this evaluation. To provide the necessary "seed money" funding, we are ordering NYNEX to continue accruals of \$333,333 monthly into a special account.

To oversee implementation of this plan, we are creating an Advisory Board to assist us by reviewing alternatives available to schools and libraries, and by recommending specific alternatives for our approval. The Advisory Board will comprise two members of the Commission staff, one of whom shall serve as the Board's chairperson, and one representative from each of the following: the Office of the Public Advocate, NYNEX, the New England Cable Television Association, the Maine Department of Education, the Maine library community and Maine internet service providers.

II. BACKGROUND OF PROCEEDING

A. Commission Order; Procedures

In the Order determining the proper level of revenues and earnings for the New England Telephone and Telegraph Company, d/b/a NYNEX, we found that NYNEX should reduce its Maine intrastate revenue requirements by \$14.446 million. The Commission held that up to \$4.0 million of the mandated rate reduction should "be used to reduce rates and/or provide additional services or

equipment to libraries and schools . . . in the belief that significant benefits to the public may be realized by providing limited support for additional access to information network and services." The Commission directed NYNEX, in consultation with other parties, to file a proposal describing how the \$4.0 million could be used to benefit libraries and schools.¹ *Frederic Pease et al. v. New England Telephone and Telegraph Company d/b/a NYNEX*, Docket No. 94-254, Order, May 15, 1995, at 58-59.

NYNEX filed that proposal on July 31, 1995. The New England Cable Television Association (NECTA), a party to this proceeding, filed its own proposal on the same day. By Procedural Order issued on August 4, 1995, parties were asked to file comments addressing certain questions we raised relating to the proposals and any other relevant issues. A Conference of Counsel was held on September 8, 1995 to allow the Commission and parties to discuss the various issues raised by the proposals. Parties and non-parties were afforded an opportunity to file further comments by September 29, 1995. More than 40 entities filed such comments.

B. Description of NYNEX Proposal

NYNEX's July 31 proposal (NYNEX Proposal) resulted from a collaborative effort among NYNEX, the Maine Department of Education, the Maine Library Commission, the Maine Library Association (MLA) and the Maine Educational Media Association with comments from other interested entities. Under the NYNEX proposal, NYNEX would provide a statewide area network connecting individual school and library locations and local area networks.

Schools and libraries would directly connect into this backbone via the NYNEX Frame Relay Service (FRS) network. Each school or library would be provided 56 Kbps FRS circuits to connect into the network. Libraries could choose either a 56 Kbps FRS access line or a business line with a modem. For those choosing a business line, there would be a credit of 22 hours per month of intrastate toll usage. Under either option, libraries could also order up to two additional voice-grade access lines at a reduced rate of \$12 per line per month.

The NYNEX proposal also envisions an Oversight Board to oversee implementation and ongoing management of this project, training, certain network hardware, and modems for locations

¹According to NYNEX's July 31, 1995 filing, its proposal was "the product of extensive collaborative efforts among NYNEX, the Department of Education, the Maine Library Commission, the Maine Library Association and the Maine Educational Media Association." According to this filing, NYNEX was also assisted by comments of PUC Staff, OPA, NECTA, Maine Science & Technology Foundation, and members of the Maine Legislature. NECTA did not join the endorsement but, as explained below, presented its own variation.

choosing the business line option. In describing the proposal, NYNEX stated that over the 7-year period it expects this project to be in place, it would spend at least \$4.0 million annually to benefit Maine schools and libraries. NYNEX recommended an annual reconciliation process to allow parties to monitor and adjust expenditures so as to utilize fully the annual allowance of up to \$4.0 million. In its September 29 comments, NYNEX stated that it is willing to measure the cost of the proposal under an incremental cost method, and that NYNEX was working with the parties to develop a so-called Total Service Long Run Incremental Cost (TSLRIC) methodology, anticipated to be completed shortly.

C. Description of NECTA Proposal

NECTA proposes a variant on the NYNEX proposal. It proposes a 2-tier system that includes a so-called Backbone Tier and an Access Tier. The Backbone Tier would consist of the same elements proposed in NYNEX's backbone and any necessary training. NECTA proposes that local communities of interest be allowed to select the most appropriate Access Tier technologies to address their specific information requirements. Communities could choose access items offered by NYNEX (such as Frame Relay Service, modems and business lines, or other tariffed network services offered by NYNEX or independent telephone companies), or services offered by cable television-based data networks, or private or community-owned networks. NECTA proposes that "Equivalent Value Funding" be made available for these services. That amount would equal the value of the proposed FRS option. For example, if a 56 Kbps access line and associated hardware represent \$1,000 in recurring costs and \$500 in one-time costs, the school or library could use those amounts to purchase an alternative service that its needs.

D. Summary of Other Comments

Several internet service providers (ISPs) objected to the use of ratepayer funds to fund NYNEX's Frame Relay Services. They contend that NYNEX is using ratepayer funds to allow it to develop an infrastructure that it will use for commercial purposes. The ISPs believe that the NYNEX Frame Relay Service will compete with their services. One ISP suggests that we exclude any expenditures that NYNEX would have made anyway for the provisions of Frame Relay Services.

Several commenters, including NECTA, several schools and school districts, and several internet service providers, have also commented that the 56 Kbps access service proposed by NYNEX is too technically limited. Those commenters have proposed allowing users to receive equivalent funding to configure their own access networks in a manner which better suits their needs.

A proposal "to fund the acquisition and installation of computers/printers in smallest libraries" was made by an individual from Parsonsfield, Phil Degnon. Mr. Degnon commented that the NYNEX proposal "falls short of meeting the needs of the very small communities with their equally small libraries" that cannot afford computer equipment to access the network. A number of other commenters endorsed Mr. Degnon's proposal.

III. THE APPROVED PLAN

We approve a plan for public libraries and public schools ("users") throughout NYNEX's service territory that includes a Backbone Tier available to all users and an Access Tier that includes alternatives that can be selected by the users. In approving this plan, our intent is to provide schools and libraries basic but adequate connections to advanced information services. Despite claims by other potential providers that they may be able to provide higher-quality facilities, very few schools and libraries are now connected to advanced information services. Nevertheless, we do not wish to discourage other initiatives intended to advance the availability of any particular group of services or technologies. We do not intend that our action favor or disfavor any entity's future participation in Maine's information services market, or cause construction of needlessly duplicative facilities. Indeed, the provision below for alternative equivalent value services is intended to encourage other initiatives.

As noted above, it is our intent that the funding we have made available shall be used, at least initially, to provide 56 kbps connection for each school and library.² A school or library desiring access capability above 56 kbps may use equivalent value funding to help pay for such a connection. However, it is not our intent to allow any school or library to use equivalent funds to pay for any existing connection that is already capable of delivering the service (56 kbps).

²Depending on ultimate funding availability, in the future we may consider increasing the minimum standards.

A. Eligible Public Schools and Libraries

1. Public Libraries

We adopt a definition of public libraries that we believe is consistent with that proposed by the NYNEX plan and the parties supporting that plan. MLA's August 25, 1995, comments propose that the category include "public libraries as defined by statute, libraries in publicly funded institutions of higher education, the county law libraries, the Maine State Library, and the Maine Law and Legislative Reference Library." We adopt this proposed definition. However, one portion of that definition, "public libraries as defined by statute," is not entirely clear. The statutes that define "free public libraries" are located at 27 M.R.S.A. §§ 101 and 102. In addition, section 106 states that "libraries owned or controlled by corporations, associations or trustees" that receive municipal funding so that its inhabitants may have the "free use of its books" shall be considered a "free public library."

Another, somewhat more expansive, definition of "public library" is contained in 27 M.R.S.A. § 110(10):

10. Public Library. "Public library" means a library freely open to all persons and receives its financial support from a municipality, private association, corporation or group. The above serves the informational, educational and recreational needs of all the residents of the area for which its governing body is responsible.

That definition is only intended to be used in Chapter 4 of Title 27, Regional Library Systems. The primary difference between the section 110(10) definition and those in sections 101, 102 and 106 is that the more generally applicable provisions require municipal funding. Section 110(10) does not.

The MLA comments further state, however: Many of the Maine libraries which are contributors to the statewide integrated library resource sharing system are presumed to be outside the scope of the Order. These include libraries in medical centers, libraries in museums and historical societies, libraries in private research laboratories, and libraries in privately funded institutions of higher education.

We are generally disposed to adopt the restrictions "presumed" by MLA, at least for the present. We are concerned that the definition in 27 M.R.S.A. § 110(10) would automatically include many entities that should not be included at this time.³ On the other hand, there may be libraries that are generally thought to be "public" in that they have general collections available to the public, but receive no municipal funding. We therefore will adopt a definition of "public libraries" that effectively includes all municipally-funded libraries and those that are part of a regional library system, as well as the others specifically listed in the MLA's proposed definition:

1. The Maine State Library, the Maine Law Library and Legislative Reference Library, county law libraries and libraries in publicly funded institutions of higher learning.
2. All libraries described in 27 M.R.S.A. §§ 101, 102 and 106;
3. All libraries that are defined in 27 M.R.S.A. § 110(10) and that are members of a "library district" as defined and described in 27 M.R.S.A. §§ 110(7) and 114; and
4. All "area reference and resource centers" and "research centers," as defined in 27 M.R.S.A. §§ 110(2) and (12), provided that they are also "public libraries" as described in 27 M.R.S.A. § 110(10).

In their exceptions, the libraries proposed "standards" for inclusion that appear to be similar, but may or may not be identical to the statutory definitions adopted above. Unless problems develop using the statutory definitions, we will rely on the set of definitions we describe above.

³In comments filed in response to the Examiner's Report, the Maine Department of Labor requested inclusion of its "libraries," i.e., the job training information resources available at seven of its regional offices. For the present, the Department's facilities should be included only if they fall within the definition set forth below. In doubtful cases, the Board may recommend whether a particular library is within or outside of the definition we have adopted.

Depending on the availability of funding within the overall limit of \$20.0 million, the Advisory Board may, at some future time, wish to propose a somewhat more expansive definition.

2. Schools

The proposal was limited to "public" schools although no reason was given for that limitation. We were unable to find in the record any proposed definition for "public" schools, despite NYNEX's reference to a definition provided by the "DOE and Library Group." 20-A M.R.S.A. § 1(24) provides a reasonable and clear definition of public schools.⁴ Under that definition, public schools are limited to the grades kindergarten through 12.⁵ For our purpose, we will include within the definition of public schools those private secondary schools that are "private schools approved for tuition purposes." See 20-A M.R.S.A. §§ 1(23) and 2951.

The Office of Maine Catholic Schools filed a comment in response to the Examiners' Report requesting that parochial schools be included in the program. We will not at this time expand the program beyond public schools. We intend to re-examine this issue at the conference described below in Part VIII.

B. Backbone Tier

NYNEX is hereby directed to provide throughout its territory in Maine what has been characterized by NECTA as a Backbone Tier. The Backbone Tier will be the portion of the switched packet network that interconnects individual "access tier" networks and that provides a shared access and gateway to higher level network services. We accept NYNEX's proposal for the following elements to constitute the Backbone Tier:

1. The regional network routers and dial hubs with modems;
2. Six 1.544 Mbps circuits between the regional routers;
3. Thirty-two business lines at the dial hubs; and
4. Shared services including:

⁴Title 20-A M.R.S.A. § 1(24) defines public schools as:

24. Public school. "Public school" means a school that is governed by a school board of a school administrative unit and funded primarily with public funds.

⁵A "school board" is the governing body of a "school administrative unit." 20-A M.R.S.A. § 1(28). Its function is to operate "programs in kindergarten and grades 1 to 12" 20-A M.R.S.A. § 1001(8).

- a. Internet and other gateway access,
- b. Training,
- c. Network monitoring,
- d. Help desk, and
- e. University Resources Serving Users State-wide (URSUS) equipment.

C. Access Tier

Individual schools or libraries ("users") shall have an option of the following as the Access Tier:

1. NYNEX 56 Kbps Standard Package

The first Access Tier option consists of a standard package of services and equipment that will be provided entirely by NYNEX and that will include a Frame Relay Service connection with an individual DDS-II 56 Kbps access circuit from the specific school or library to the closest FRS access point, including a local distribution channel, a 56 Kbps port and a 56 Kbps internal Frame Relay Access Device (FRAD). The FRAD will connect a computer to the frame relay transport channels.

Users will also be provided training necessary to use the services. The Advisory Board described in Part VII below shall make recommendations to ensure the training costs and content are appropriate to user needs.⁶

2. NYNEX Business Line and Modem Standard Package

The second Access Tier option consists of one voice-grade business line with 22 hours of intrastate toll usage per month and a V.34 modem that will be used to connect the business line to a computer. Training, although presumably simpler, will be provided pursuant to the same procedures as for the first NYNEX standard package.

⁶NYNEX proposed a specific training program. Comments and exceptions filed by other parties have suggested alternatives, including the provision of training by the University of Maine Computing and Processing Services (CAPS).

3. Alternative Equivalent Value Services

To address concerns such as those stated in Part II.D above, any user, subject to the limitations described below, may choose to receive alternative Access Tier "equivalent value services" in lieu of the NYNEX standard packages. Those services must provide network functions that are equivalent to or better than those provided under the NYNEX standard packages. Funding will be equal to the unseparated (total company) incremental cost to NYNEX of providing a 56 Kbps FRS connection along with a 56 Kbps FRAD, as described in Part III.C.1 above.⁷ Any additional costs must be borne by the customer. A customer choosing the "equivalent value" alternative will be permitted to "pool" or combine its individual alternative equivalent value services with other users to purchase or construct access services for more than one user.

We agree with several commenters who have suggested that NYNEX standard packages might be too technically limited and may not suit users' needs or current equipment configurations. We believe that the alternative described here will allow customers and others to propose innovative alternatives that may provide higher quality and/or cost savings.

The Access Tier services that will be available as an alternative equivalent value services will be provided by or delivered through NYNEX. They may include access technologies and network functions from NYNEX or other providers as approved by the Commission following a recommendation by the Advisory Board as described in Part VII below. To provide reasonable equivalent services to a customer, NYNEX will be required to contract with other suppliers, including other telephone companies, interexchange carriers, cable television companies, private or community owned networks, internet service providers (ISPs), or combinations thereof.⁸

⁷NYNEX should calculate this amount on a location-specific basis, but must do so only if a customer indicates an interest in obtaining an alternative system. The cost calculation shall not include the common transport costs of the FRS network, which are shared among other users of the service. NYNEX shall use total *unseparated* costs for the purpose of determining the benchmark maximum funding level, as well as for any actual cost comparison that must be made (discussed below), because it would be impossible to calculate or even estimate the separations effects prior to knowing actual usage. As explained below, however, we will require NYNEX to use post-separations intrastate incremental costs to determine the total amount of funds expended to provide service to schools and libraries. Any money paid to other providers will be treated as NYNEX expenses and will also be subject to separations.

⁸Nothing shall preclude NYNEX, on its own initiative or on the request of a customer, from proposing additional alternatives.

As explained in greater detail in Part VII below, requests by users to approve alternative equivalent value Access Tier packages shall be made to the Advisory Board, which shall make a recommendation to the Commission. The Advisory Board shall determine whether alternative equivalent value service proposals are reasonable and whether they provide functions at least equivalent to those of the first NYNEX standard package described in Part III.C.1 above. The Board may also recommend approval of necessary training subject to the overall \$500,000 limit stated in Part VII.B.2 below. Once a proposal has been approved for one user, other users shall be able to choose that alternative without further action by the Board or Commission. The Board shall maintain a list of all approved standard alternatives.

4. Computers

As suggested by commentators, we agree that connectivity to information services requires computers. Representations have been made that many institutions, particularly smaller libraries, presently do not have computers.

Therefore, an institution that represents to the Board that it presently does not have a computer that is capable of connecting to either of the NYNEX standard Access Tier Packages, or to an approved alternative package, may receive funding for one computer up to \$3,000 per institution. At the conference described below in Part VIII, we will discuss whether schools with larger student populations should receive funding to buy more than one computer. The customer will select the computer and may obtain it from a source of its choosing. Requests for computers, as well as the software that is necessary for access to information services, shall be reviewed by the Advisory Board.

We delegate to the chairperson of the Advisory Board (who will be a Commission Staff member) the authority to approve these requests. The total amount that may be expended for computers during the first year, without further Commission approval, shall be \$500,000.

5. Additional Discounted Access Lines for Libraries

We accept the proposal that public libraries be permitted to obtain one or two business voice-grade access lines at a discounted rate of \$12 per line per month. The stated purpose of this provision is to reduce "existing costs for telephone services." Some libraries have no telephone service at present. The line or lines included in this provision are in addition to the access line that may be provided pursuant to the second Access Tier standard package described above in Part III.C.2.

6. Free Public Access

We agree with the suggestion of the Education/Libraries and the OPA that the services provided by the approved plan shall be made available to the relevant public on a no-charge basis.⁹

IV. LEGAL AUTHORITY

At the Conference of Counsel held on September 8, 1995, and in the procedural order issued on September 15, we requested the parties to provide comments on the following legal question:

Whether the Commission has legal authority to require payments by NYNEX to customers (specifically, schools and libraries) that those customers could use for any purpose, including the purchase of non-NYNEX telecommunications or training services.

Several parties filed comments on this question. Some parties provided arguments that went beyond the question that we raised.

As discussed below, we believe that the broader issue argued by those parties is not presently before us. Nevertheless, we discuss those arguments because it is virtually impossible to separate them from the narrower question we asked.

The Commission Advocacy Staff (Staff)¹⁰ argues that we cannot provide funding for customers to spend with alternative suppliers or order NYNEX to make such expenditures. Its argument, however, is based entirely on a more fundamental argument that we cannot order NYNEX to spend money to provide services to the libraries and schools at all, because our power is limited to that stated in 35-A M.R.S.A. § 1306 and the approval of special discounted rates for schools and libraries that are permitted by 35-A M.R.S.A. § 703(1).

We do not believe that that broader question is presently before us, and it may even be finally settled. We issued our final order in the *Pease* case on May 15, 1995. That Order directed NYNEX to propose discounts and/or expenditures on behalf of schools of up to \$4.0 million per year. The deadline for filing motions for reconsideration expired on June 5, 1995. On that date, the American Association of Retired Persons (AARP)

⁹The "relevant" public for a public library is the patrons it serves for other purposes. The "relevant" public for a school includes its students.

¹⁰In this Order, the Commission's Advocacy Staff is referred to as "Staff." Other Commission staff members, including the Examiners, are assigned to these cases as advisors. The Advocacy Staff functions as a party to the case by presenting evidence and argument, without specific direction from the Commission.

filed a Motion for Reconsideration which specifically raised the issue of whether there was sufficient *record support* to justify the Commission's conclusion that up to \$4.0 million of the revenue reduction should be used for the benefit of schools and libraries. No party, including AARP, raised the issue of the Commission's legal authority to order such expenditures on behalf of schools or libraries prior to the expiration of the time to file a motion for reconsideration.¹¹ The May 15 Order is now on appeal to the Maine Supreme Judicial Court sitting as the Law Court. One appellant has attempted to raise the issue, but the Law Court may lack jurisdiction.¹² In any event, we do not consider the issue to be presently before us.¹³

"AARP's motion was denied by operation of Chapter 110, § 1004, which states that if the Commission takes no action on a motion for reconsideration within 20 days, it is denied.

¹²The Commission's authority to order expenditures by NYNEX was not raised by AARP or by Mr. Pease in their respective Notices of Appeal. 35-A M.R.S.A. § 1320 plainly requires an appellant from the Public Utilities Commission to state in its Notice of Appeal the "grounds upon which the order or ruling is claimed to be unlawful." Mr. Pease's Notice of Appeal was filed on August 4, 1995. Subsequently, on October 6, 1995, Mr. Pease filed a purported amendment to his Notice of Appeal. The Commission and NYNEX moved to limit the grounds of appeal by Mr. Pease to those listed in his original August 4 Notice on the ground that the Court lacks jurisdiction because the appellant failed to comply with the statutory requirement.

¹³In its September 27 memorandum at 2 and 7, the Public Advocate appears to argue that the order was lawful because no one had appealed the issue. (The Public Advocate's memorandum was filed prior to Mr. Pease's attempted amendment of his Notice of Appeal.)

We find the Public Advocate's proposition rather different from the possibility that the order may be final and therefore not attackable.

Applied to its narrower focus of whether NYNEX can be ordered to make expenditures on non-NYNEX services, we reject Staff's argument. Staff argues that the Commission's powers generally are limited to those provided by statute. *New England Telephone and Telegraph Company v. Public Utilities Commission*, 362 A.2d 741 (1976). Staff believes that in an investigation pursuant to 35-A M.R.S.A. §§ 1302 or 1303, our power is limited to those enumerated in section 1306, e.g., to find that a rate, service, act or practice is unreasonable and to order reasonable rates or reasonable service be substituted or to order a utility to cease an unreasonable act or practice. The Staff overlooks two recent legislative policy directives. The Public Advocate argues that 35-A M.R.S.A. § 7101(2) provides a basis for our order. That subsection states:

2. Economic development. The Legislature further declares and finds that a modern state-of-the-art telecommunications network is essential for the economic health and vitality for the State and for improvement in the quality of life for all Maine citizens. Therefore, it is the goal of the State that all Maine's businesses and citizens should have affordable access to an integrated telecommunication infrastructure capable of providing voice, data and image-based services. The State shall consider policies that:

- A. Encourage economic development;
- B. Employ methods of regulation that encourage the development and deployment of new technologies; and
- C. Encourage acceptable service applications that support economic development initiatives or otherwise improve the well-being of Maine citizens.

We see no reason why the phrase "the State" does not include its agencies, particularly the Public Utilities Commission. The placement of this statute in 35-A lends weight to those conclusions.¹⁴

¹⁴It would make little sense for the Legislature to aim the directive solely at itself. The Legislature should not be presumed to enact laws that in effect direct it to enact other laws.

The Staff's argument also overlooks one of the "conditions" or "objectives" that we must ensure in approving any alternative form of regulation (AFOR). 35-A M.R.S.A. § 9103(7) states:

7. Encourage telecommunications services.

The alternative form of regulation must encourage the development, deployment and offering of new telecommunications and related services in the State.

We ordered the libraries' and schools' funding in the *Pease* rate case, rather than in the alternative form of regulation (AFOR) case. Nevertheless, the two proceedings were consolidated and conceptually linked by virtue of the fact that the rate case established the starting point for rates under the AFOR. The parties themselves, in their joint briefing outline approved by the Examiners, proposed to address the issue of funding for schools and libraries in the AFOR case. Moreover, the Order clearly contemplated that the funding be provided for the duration of the AFOR, i.e., up to \$4.0 million during each of the five years of the AFOR. We therefore consider that our Order requiring the funding for schools and libraries is as much a condition of the AFOR as it is part of the rate reduction order and is justified pursuant to the statutory condition of the AFOR statute quoted above.

In addition, 35-A M.R.S.A. § 104 grants the Commission "implied" powers to carry out its "express powers and functions:"

The provisions of this Title shall be interpreted and construed liberally to accomplish the purpose of this Title. The commission has all implied inherent powers under this Title, which are necessary and proper to execute faithfully its express powers and functions specified in this Title.

Sections 7101(2) and 9103(7) state express functions or powers (or even obligations) that the Legislature has granted (or imposed) on this Commission. Under section 104, we have the authority to implement those powers and functions through our ratemaking powers and other regulatory authority over telephone utilities.¹⁵

¹⁵ The Public Advocate also points to our recent Order in *Public Utilities Commission, Re Investigation of Modification of Central Maine Power Company's Electric Lifeline Program For the 1993-1994 Program Year*, Docket No. 93-156, Order (March 10, 1994). In that case, over the objection of CMP, the Commission ordered that recipients of funds under the Electric Lifeline Program (ELP) could use those funds for the purpose of fuel conversions, i.e., for the purchase of a non-electric heating system provided by entities other than CMP. In that Order, we ruled that an ELP recipient may

For all of these reasons, we conclude that we have the authority to order NYNEX to provide internet and information connection services that in some respects may be provided under contract through or by other entities. We reject the Staff's argument that our statutory powers are limited to those enumerated in section 1306 and in other related ratesetting sections such as 310 and 703(2) (A).

NYNEX purports to address the narrow question of providing funding for customers to use for alternative suppliers of internet and information services. However, its argument is essentially the same as Staff's that the Commission's powers are limited to finding that rates or practices are unreasonable and ordering reasonable rates or practices substituted. Staff and the Public Advocate point out that if NYNEX's argument were accepted, its own proposal might also be illegal, inasmuch as it includes providing equipment itself and provides for certain portions of the service to be supplied by other providers. For reasons similar to our rejection of Staff's argument, we also reject NYNEX's argument.¹⁶

We decide that we have sufficient authority to order NYNEX to implement the plan we have described in Part III above, at least in light of the particular features of that plan. Under the plan, NYNEX must provide schools and libraries with a service, i.e., connecting them to information services. The service will be provided pursuant to two standard plans or by an alternative "equivalent value" plan. Under both the standard plans (as proposed by NYNEX) and under an alternative plan, NYNEX may be required to provide part of the service through an outside supplier. For an alternative plan, NYNEX must contract with an outside supplier to provide part of the service only following: (1) a request by a customer for an alternative method of providing an information connection, (2) an opportunity for NYNEX to propose a less-expensive alternative plan of its own, (3) a recommendation by the Advisory Board that an alternative plan should be approved, and (4) approval by this Commission upon a finding that the alternative plan is reasonable. It is not uncommon for utilities to contract with outside suppliers to

use some or all of its benefit to fund electric reduction measures, including fuel conversions.

¹⁶NECTA also presented arguments in support of its proposal that "equivalent" funding be provided for alternative plans that utilize the services of outside (non-NYNEX) providers. NECTA argues that the Commission can and "in effect" did find that NYNEX's service to schools and libraries was "unreasonable" and, under 35-A M.R.S.A. § 1306(6), can order a reasonable service or practice substituted.

NECTA also relies on the "charitable or benevolent rate" provision of 35-A M.R.S.A. § 703(2) (A).

provide services that allow the utilities to provide services to their customers in the most efficient manner. Indeed, NYNEX itself has proposed to contract with outside suppliers for certain portions of the standard packages.¹⁷ Moreover, it is our obligation to assure that utilities are "operating as efficiently as possible" in order that they provide their service at rates that are as low as reasonably possible. 35-A M.R.S.A. § 301.

Because of the policy directives in 35-A M.R.S.A. §§ 7101(2) and 9103(7), which we construe to be broad grants of authority, our authority pursuant to 35-A M.R.S.A. § 104, and our ratemaking powers under 35-A M.R.S.A. §§ 101 and 301, to implement express policies, we rule that we have the authority to order NYNEX to provide information connection services in the most reasonable manner possible, including, where necessary and appropriate, through services provided by outside providers.

V.AVAILABILITY IN AREAS SERVED BY INDEPENDENT TELEPHONE COMPANIES

The Telephone Association of Maine (TAM) and NYNEX have requested that all public schools and libraries in the State of Maine, including those served by Independent Telephone Companies (ITCs), should qualify for participation. NYNEX and TAM point out that ITCs participated in the discussion leading to the proposed plan. TAM points out that ITCs serve approximately 40% of the schools and libraries in the State.

Our decision that NYNEX should implement a program for the connection of schools and libraries to information services was made in a NYNEX rate case in which we ordered NYNEX's rates reduced by approximately \$14.4 million annually and that up to \$4 million of that amount (per year) be used for the program. The case did not address the revenue requirements of the independent telephone companies, although it automatically altered their toll rates because ITCs concur in NYNEX's toll rates.

We believe that the potential benefits of this program should be extended to all public libraries and schools in the State, provided that the same plan we have approved for NYNEX shall also apply to the independent telephone companies, and that NYNEX and the ITCs are able to reach agreement about any operational or interconnection issues. We reserve the issue of any ratemaking treatment of any capital costs of expenses incurred by the ITCs. However, in order that those costs may be ascertained, ITCs shall separately account for all capital costs, expenses and revenue effects that are incurred in connecting libraries and schools. NYNEX has agreed that lost revenue (which may be very difficult to ascertain) will not be considered in determining how much of the \$4 million per year (\$20 million over

¹⁷See NYNEX Proposal at 32.

five years) has been spent. We consider this condition also to be applicable to the ITCs.¹⁸

VI. MEASUREMENT AND TRUE-UP

A. Measurement of Costs

To determine what portion of the up to \$4.0 million per year reduction from intrastate revenues has been spent, we will adopt the Staff proposal that NYNEX's incremental costs (investment and expenses) be used for that purpose. In its September 29 comments, NYNEX agreed with the Staff's proposal. NYNEX shall use jurisdictionally intrastate (post-separations) incremental costs. Jurisdictional incremental costs for each category of type of investment will be determined by using the same cost allocation factors from 47 CFR Part 36 that are used to allocate each category of NYNEX's book investments and expenses between the interstate and intrastate jurisdictions. By "incremental," we mean only those reasonable costs that NYNEX has spent on behalf of the schools and libraries.¹⁹ It shall not include amounts that NYNEX has spent or will have spent anyway for network functions needed to provide Frame Relay Services.

NYNEX filed a rate schedule for Frame Relay Services (FRS) on June 28, 1995. The schedules were approved on August 29, 1995 (Docket No. 95-232), and we understand that the equipment, including software, necessary, to provide FRS was in place and functioning at about that time. NYNEX has also implemented FRS in the other states it serves. It therefore appears that the network functions necessary to provide FRS would have been in place and provisioned in any event, and that expenditures should not be considered for that system as incremental expenditures for schools and libraries. Within 30 days following the issuance of this Order, NYNEX shall file a detailed accounting of the costs it has (or will) incur for the construction of the facilities necessary to provide Frame Relay Services pursuant to the rate schedules approved on August 29, 1995.

NYNEX, in consultation with the Commission Staff, shall make an initial report using the described methodology for the measurement of its cost and/or expenditure by January 1, 1997. NYNEX shall provide its report simultaneously to the Commission

¹⁸In its comments on the Examiners' Report, TAM did not raise any objection to the plan proposed by the Examiners.

¹⁹Under the circumstances explained in Part III.C.3 above, some of the incremental spending may be spent on alternative services for customers that do not want to participate in NYNEX's standard packages. Portions of those alternative services may be provided by cable companies, ISPs and others.

and to our Advisory Board for review. The Commission may adjust, revise, modify, or expand the Approved Plan on the basis of that report.

B. Accrual

In our May 15, 1995 Order in Docket No. 94-254, we ordered NYNEX "to establish an account in which it will accrue \$333,333 per month" beginning on June 1, 1995 and continuing "until such time as the Commission approves its proposal to use these amounts." Our objective with respect to these funds is to provide "seed money" to enable users to be connected to advanced information services. Since the need for these funds has not yet been fully resolved, NYNEX will continue to accrue \$333,333 per month into the special account until May 31, 2000 or until recommended otherwise by the Advisory Board and approved by the Commission. We do not presently anticipate that this source of funding will be renewed after the 5-year term.²⁰ Accordingly, schools and libraries should plan for their own funding of these services and equipment after that time.

For planning purposes, although \$333,333 is being accrued monthly into the special account, and although we have stated that "no more than \$4.0 million per year" will be used for this limited support, the Advisory Board should consider that the result of our decision is the allocation of not more than \$20.0 million during the 5-year period ending May 31, 2000 for these purposes. The disbursement of funds need not be limited to \$333,333 monthly or \$4.0 million annually, provided that the five-year \$20.0 million ceiling is not exceeded. It is reasonable to expect that initial up-front costs may exceed those in later years. We will evaluate the amounts being collected and expended, the appropriateness of the funding mechanisms we are adopting, the overall effectiveness of this process, and the benefit to the general body of ratepayers, during our reviews of the Alternative Form of Regulation we have adopted in Docket No. 94-123.

VII. OVERSIGHT

A. Commission Responsibility

NYNEX in its proposal recommended the creation of an Oversight Board consisting of representatives from the education and library communities, NYNEX, and other parties "that might be identified . . . to oversee the implementation and ongoing management of this project." NYNEX Proposal at 20. The Advocacy Staff, relying primarily on cases decided by the federal courts, argues that the Commission cannot lawfully delegate its

²⁰To the extent that the NYNEX plan called for a 7-year period, we decline to adopt it.

regulatory powers to an outside agency or board. The Public Advocate suggests that the Commission has the legal authority to delegate "certain functions" to an outside board. OPA Memorandum and Additional Comments at 18-24.

We do not need to decide this issue. For policy reasons, we believe we should exercise firm control over the expenditure of ratepayer money by a public utility to insure that the public interest is served. Thus, at all times we will retain ultimate responsibility and authority with respect to matters pending before us. We will order the creation of an Advisory Board to assist us with limited, clearly-defined functions necessary for the administration of this plan.

B. Advisory Board

The Advisory Board will have limited functions and shall engage in a collaborative effort to assist us by ensuring that our decisions will be made upon the best information and basis possible. The primary role for our Advisory Board will be to ensure that the needs of all interested parties are considered and represented in the information presented to the Commission for any decision we are asked to reach regarding this plan. We will appoint to the Advisory Board a member representing the Commission's Staff who will act as the Chairperson of the Advisory Board and who shall be responsible to the Commission for the activities of the Advisory Board.

1. Membership

The Commission will appoint a member of its staff as Chairperson of the Advisory Board. Other members of the Advisory Board will be:

- a. a second member of the Commission's Staff;
- b. a representative of the Office of the Public Advocate;
- c. a representative of NYNEX;
- d. a representative from a Maine member of NECTA;
- e. a representative of the Maine Department of Education, appointed by its Commissioner;
- f. a representative of the Maine library community, selected jointly by the Maine Library Commission, the Maine Library Association, and the Maine Educational Media Association; and

- g. a representative of Maine Internet Service Providers (ISPs), selected by the ISPs that have filed comments in Docket No. 94-254.

Members of the Advisory Board shall be selected within 30 days from the date of this Order. The Commission's Administrative Director shall be notified of those selections, any alternate members that may be selected, and of subsequent changes in membership.

2. Duties, Responsibilities, and Authority

The Advisory Board shall develop and recommend for the Commission's approval procedures and timelines for implementing the Approved Plan (Part III above). Those recommendations shall be reported to the Commission within 90 days after the date of this Order.

The Advisory Board shall review any request by school or library users for proposed Access Tier Alternative Equivalent Value Services pursuant to Part III.C.2 above, to ensure those proposals are reasonable and that they provide functions that overall are at least equivalent to those of the first NYNEX standard package described in Part III.C.1.a above. If an alternative supplier is selected, NYNEX should pay (and book as an expense) only the amount of that supplier's proposal up to a maximum of the level of costs for the NYNEX 56 Kbps package, as determined by the Board.

The Chairperson, in consultation with other members of the Commission's Advisory Staff as appropriate, shall examine NYNEX proposals for the proposed Backbone Tier and optional Access Tier Standard Packages described in Parts III.B, III.C.1 and 2 above, to ascertain that the costs of those proposed elements are calculated correctly for the purpose of ultimate measurement pursuant to Part VI.A above. To the extent that NYNEX files as confidential competitively-sensitive information, the chairperson shall order appropriate protection.

It shall not be necessary for a user choosing one of the NYNEX standard packages, or a previously approved alternative equivalent value package, to consult with the Advisory Board about that selection. There is no need for an Advisory Board recommendation or Commission approval of the use of standard packages as described in Parts III.C.1 or 2 above. A qualified user need only request the service from NYNEX.

The Advisory Board shall review requests and proposals for training and make recommendations for approval to ensure the proposed training meets user needs and that the costs of training are reasonable. The Board may also consider whether to recommend standard training packages. For the first year we will approve up to \$500,000 in training expense unless there is good cause to increase that limit.

The Advisory Board shall review NYNEX's initial measurement and true-up report submitted pursuant to Part V.A above, and shall provide its evaluation of that report to the Commission. The Advisory Board's report may include recommendations for further action by the Commission.

The Advisory Board shall review and report on any other aspect of administration of the plan as requested by the Commission.

3. Procedure

The Chairperson shall schedule regular meetings of the Advisory Board, at which members of the Advisory Board shall address matters that are assigned to them by this Order. Meetings will be open to the public. The Chairperson will determine the extent of public participation at Advisory Board meetings. To the extent that proprietary or competitively sensitive information that requires trade secret protection must be brought before the Advisory Board, the Chairperson may issue such protective orders as may be necessary, pursuant to the Maine Rules of Civil Procedure.

Proceedings by and before the Board shall be informal. They shall not be considered adjudicatory proceedings. The voting members of the Board shall attempt to reach consensus on its recommendations and other issues brought before it. "Consensus" shall mean agreement by four of the five "public" members of the Advisory Board. The voting members will not include entities that have or that represent industries that have financial interests in the outcome of the Board's recommendations. Thus, the voting members shall be the Commission Staff members, the representative of the OPA and the representatives of the libraries and schools. For a particular decision, the Board may decide that it will make a recommendation by majority vote, provided that those voting the minority have some reasonable opportunity to present their views to the Commission. Decisions to recommend approval or disapproval of request for alternative equipment value services shall be made within 30 days.²¹

If it should appear that consensus of the Advisory Board may not be reached on a matter, the Chairperson shall refer the issue to the Commission for decision. Generally, the Chairperson shall issue a Report to the Commission that

²¹If the Board initially receives a substantial number of such requests, such that they cannot all be processed within 30 days, the Chairperson of the Advisory Board, in consultation with the Chairman of the Commission, may temporarily enlarge the 30-day deadline for processing requests.

summarizes the issues and may include proposed findings. When appropriate, the Chairperson may devise other procedures that will enable the Commission to make an informed decision. As noted above, the Advisory Board proceedings are not adjudicatory.

However, when the Chairperson issues a report, the provisions of Chapter 110, § 752, which govern a presiding officer's (examiner's) reports, shall provide guidance. Thus, an opportunity shall be provided for board members and persons with a direct stake in the outcome to comment on the report or other appropriate opportunity to make their views known to the Commission. We expect that those persons will contact the Commission only through the procedures established by the Board Chairperson.

C. Reporting

The Chairperson of the Advisory Board shall initially, at least quarterly, advise the Commission on the status of the Advisory Board's administration of the plan, including all activities of the Advisory Board, issues brought to the Advisory Board, consensus recommendations reached, and schedules established for further plan administration.

VIII. RELATIONSHIP TO OTHER INFORMATION SERVICE INITIATIVES

Concerns have been raised about possible duplication with the asynchronous transfer mode (ATM) network that the State is planning to implement, or the possibility that the ATM network may be able to provide information services connectivity to high schools and to the seven libraries that the State proposes shall be served by that network. We understand that a primary purpose of the ATM network is to provide interactive classroom capability. It is possible that high schools and the seven libraries would be able to obtain information services through the ATM network.²² To clarify the relationship between the frame relay system and ATM, to avoid duplication of facilities, to make the best use of ratepayer dollars, and to ensure coordination of various activities relating to providing telecommunication service to schools and libraries, we will hold a further conference of the parties and other interested persons in the near future.²³ As noted above, at the conference we will also discuss the issue relating to number of computers per school and whether certain private schools should be eligible.

²²To the extent that funding for connecting to the ATM network is not already provided by proceeds of the bond issue recently approved by voters, alternative equivalent value funding may be available for the purpose of connecting to the ATM network. Obviously, a high school or library may choose not to participate in the NYNEX plan.

²³Notwithstanding that conference, we consider all of the decisions set forth in this Order to be final decisions.

Accordingly, it is

O R D E R E D,

That:

1. A plan to reduce rates and/or provide additional services or equipment to libraries and schools is approved as outlined in Part III of this Order;
2. Docket No. 94-254 is closed;²⁴
3. A new non-adjudicatory proceeding will be opened to implement the decisions contained in this Order;
4. An Advisory Board is created as described in Part VII of this Order;
5. The entities selecting members of the Advisory Board pursuant to Part VII.B.1 above shall notify the Commission's Administrative Director of these selections within 30 days from the date of this Order;
6. The Chairperson shall convene the Advisory Board within 45 days of the date of this Order;
7. The Advisory Board shall develop and make recommendations concerning implementation of the Approved Plan as described in Part VII.B.2 above within 90 days of the date of this Order;
8. NYNEX shall report its accounting of costs for FRS facilities as described in Part VI.A above within 30 days of the date of this Order; and
9. NYNEX shall continue to accrue \$333,333 per month into a special account as described in Part VI.B above.
10. A conference of parties and interested persons will be held in the near future to address the following issues:
 - a. The relationship between the frame relay system approved in this Order and the asynchronous transfer mode (ATM) system being implemented by the State of Maine,

²⁴Docket No. 94-123 shall remain open until our approval of a methodology for calculating total service long-run marginal costs and service quality and reporting issues.

b. The definition of eligible schools, and

c. The number of computers per school.

Dated at Augusta, Maine, this 5th day of January, 1996.

BY ORDER OF THE COMMISSION

Christopher P. Simpson
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Nugent
COMMISSIONER CONCURRING: Hunt

This document has been designated for publication.

CONCURRING OPINION OF COMMISSIONER HUNT

I support the Order's goal to provide advanced telecommunications services to our public schools and libraries. The Order is sufficiently flexible to afford user choice and it achieves that end with relatively few bureaucratic hurdles. I find these features of the Order particularly important.

I write separately because I regret that the record in this case does not indicate that there has been integrated planning of the State's various initiatives to advance telecommunications technology at our public institutions with ratepayer and taxpayer bond dollars.

Specifically, this Order adopts voice grade or Frame Relay Service as the "standard service" for all public schools and libraries using ratepayer dollars. The choice of any other service at least initially requires additional approval by the PUC and more effort on behalf of the school or library. The Order also ensures the availability of computers. Although Frame Relay Service is capable of providing internet access, so are other more sophisticated technologies such as Asynchronous Transfer Mode.

The State issued a Request for Proposal for Asynchronous Transfer Mode technology for 136 high schools, seven libraries and 27 vocational schools. And in November, voters approved a \$15 million bond to make it possible for schools to purchase equipment necessary for ATM. ATM can provide distance learning capability as well as internet access.

While the two efforts do not conflict, this Commission was neither part of, nor formally made aware of, any attempt to move the projects in concert. I believe the common pursuit to bring the information age to the public schools calls for a unified effort by all players to make the best possible use of public dollars.

As a result, I believe there remain questions unanswered. For example, does the fact that the State, with input from the Department of Education, issued an RFP for ATM for the high schools mean that the high schools want ATM's capacity for distance learning and internet access rather than Frame Relay Service's internet access alone? If so, why did the Department of Education, in our proceeding, endorse Frame Relay Service as the technology of choice for the high schools? Given the State's goal to equip the high schools with ATM, is it likely that those schools may seek the alternative funding for ATM? Should we not have considered tailoring this Order to automatically accommodate the State's ATM project?

I appreciate the Commission's willingness to hold a conference to discuss the interplay of the various technologies and telecommunication infrastructure initiatives. However, it is unfortunate that the record in this case does not reflect a coordinated effort to make the best, most efficient use of public dollars.

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of adjudicatory proceedings are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which consideration is sought.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Civil Procedure, Rule 73 et seq.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.